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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 v.

12 HUGO VICTOR NUNEZ-
13 VELASCO,

14 Defendant.

NO. CR-11-2055-RHW

**ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS**

15 The Defendant is charged with being a deported alien found unlawfully in the
16 United States in violation of 8 U.S.C. § 1326. Defendant moves for dismissal of the
17 indictment based on the alleged invalidity of the underlying deportation order. The
18 Court heard argument on July 19, 2011. Present for the Government was Alison
19 Gregoire; Diane Hehir appeared on behalf of the Defendant. After considering the
20 parties' submissions and arguments, the Court will grant the Defendant's motion and
21 dismiss the Indictment.

22 **I. BACKGROUND**

23 Although Defendant was deported in 2005, the events forming the basis of this
24 case began several years before. On June 2, 2000, Defendant received a Notice to
25 Appear before an Immigration Judge ("Notice"). He was seventeen years old at the
26 time. The Notice indicated that Defendant was to appear at the immigration court in
27 Seattle, but it did not specify the time or date. Defendant maintains that he never
28 received a supplemental Notice containing that information. The Government,

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1 however, produces a document mailed to Defendant's home address dated August 21,
2 2000, setting his hearing for October 18, 2000, at 2:30 p.m. This notice was addressed
3 to Defendant only; no copy was separately mailed to Defendant's father, his custodial
4 guardian at the time.

5 Defendant failed to appear at that hearing. After reviewing the record, the
6 Immigration Judge proceeded in absentia and entered an Order of Removal. The Order
7 indicates that a copy was sent to Defendant at his home address. On March 15, 2001,
8 the I.N.S.¹ sent to Defendant-again at his home—a letter detailing the arrangements
9 for his departure from the United States. The letter was sent via registered mail, and
10 Defendant signed the acknowledgment of receipt. In addition to scheduling his
11 deportation for April 12, 2001, it stated: "A review of your file indicates there is no
12 administrative relief which may be extended to you[.]" Defendant did not appear for
13 removal.

14 Defendant absconded into society until November 5, 2005, when he was found
15 in a Sunnyside, Washington jail and finally deported. The Government again found
16 Defendant in the United States in 2011 and the Government brought this indictment.

17 II. ANALYSIS

18 In a criminal prosecution under § 1326, due process requires a meaningful
19 opportunity for judicial review of the underlying deportation. United States v.
20 Zarate-Martinez, 133 F.3d 1194, 1197 (9th Cir. 1998). Because the removal order
21 serves as a predicate element of an illegal reentry conviction under Section 1326, a
22 defendant charged with that offense has a Fifth Amendment right to collaterally attack
23 the removal order. United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1047 (9th Cir.
24 2004).

25 To sustain a collateral attack on an underlying removal order, a defendant must

26 ¹ The I.N.S. subsequently has been subsumed within the Department of
27 Homeland Security and renamed Immigration and Customs Enforcement (ICE).
28 For ease of reference to the exhibits, "I.N.S." is used throughout.

1 establish that: (1) he exhausted all administrative remedies available to him to appeal
 2 his removal order, (2) the underlying removal proceedings at which the order was
 3 issued improperly deprived him of the opportunity for judicial review, and (3) the
 4 entry of the order was fundamentally unfair. *See* 8 U.S.C. § 1326(d). If a defendant
 5 succeeds in this three part test, the indictment against him must be dismissed. United
 6 States v. Pallares-Galan, 359 F.3d 1088, 1091 (9th Cir. 2004).

7 Defendant contends that he is entitled to dismissal because the Order of
 8 Removal—the predicate to the Section 1326 violation charged here—is fundamentally
 9 flawed in two respects. First, Defendant maintains that he never received actual or
 10 effective notice of his hearing. Second, he argues that the I.N.S.'s statement that no
 11 administrative relief was available following the hearing in absentia was erroneous,
 12 and thus that it denied him due process.

13 The Court finds both of Defendant's arguments persuasive, and it grants this
 14 motion in the alternative using both theories.

15 **A. Sufficiency of Notice**

16 Defendant asserts that the I.N.S. deprived him of both actual and effective
 17 notice of his deportation hearing. Because the Court finds that the I.N.S. failed to
 18 provide effective notice, it does not reach the question of whether Defendant actually
 19 received the notice sent.²

20 **1. Effective Notice**

21 Defendant contends that notice also should have been sent to his father because
 22 Defendant was a minor at the time. This argument was first raised in his reply brief

23 ²The Court notes, however, that it is far from certain from the record that
 24 Defendant actually received notice with a complete hearing schedule. The
 25 Government produces copies of a complete notice sent to Defendant's home, but
 26 Defendant maintains he never received it. More troubling, at Defendant's removal
 27 hearing the Immigration Judge said that "[s]ome of the notices have come back,"
 28 without further explanation as to whose notices were affected. (ECF No. 39, at 3).

1 (after he received the supplemental notice in discovery). Defendant relies primarily
2 on Flores-Chavez v. Ashcroft, 362 F.3d 1150 (9th Cir. 2004), which granted a petition
3 to reopen a BIA proceeding on these grounds. The Government responds that
4 although Defendant was a minor on the date the notice was sent, he was an adult on
5 October 18, 2000, the date of the actual hearing.

6 Flores-Chavez was fifteen when the I.N.S. conducted his removal proceedings;
7 written notice was sent to him but not his adult guardians. He did not appear and was
8 ordered removed. The Court sought to define the specific requirement of adequate
9 notice to alien juveniles. It started by recognizing that federal regulations require that
10 "juveniles" defined as those under 18 years old, who are initially taken into custody
11 by the government must be released into the custody of a guardian pending hearing
12 on their case. 8 C.F.R. § 242.24. The Court held the plain purpose of this provision
13 was to provide the juvenile with a resource to ensure that he would appear at the
14 hearing. Flores-Chavez, 362 F.3d at 1156. "[J]uveniles are presumed unable to appear
15 at immigration proceedings without the assistance of an adult." Id. at 1157.

16 The Court then tried to reconcile the purpose of Section 242.24 with another
17 provision providing that service of immigration notices relating to juveniles under 14
18 must be made upon the custodial guardian. 8 C.F.R. § 103.5a(c)(2)(ii). The
19 Flores-Chavez Court rejected the Government's argument that Section 103.5a clearly
20 permits service on juveniles alone if they are older than 14. The Court found this
21 cutoff arbitrary: "The INS's mysterious selection with regard to notice alone of the age
22 of fourteen as the point at which a minor no longer needs an adult's help is particularly
23 incomprehensible. Indeed, at age fourteen, a minor could not even drive himself to a
24 hearing that he is required to attend." Flores-Chavez, 362 F.3d at 1159. In summary,
25 the Court held that the construction of the entire regulatory scheme and due process
26 required service of notice to the alien, and (if he is under eighteen) to his parent or
27 guardian as well.

28 Here, Defendant was seventeen on August 22, 2000, when he received the

1 supplemental notice of his hearing. The notice is addressed only to Defendant; there
2 is no evidence notice was sent also to Defendant's father. The Government argues that
3 since Defendant was nearly an adult at the time of the notice—and was an adult when
4 the hearing occurred—that the Court should disregard the rule set forth in
5 Flores-Chavez. Indeed, Defendant was just three weeks away from turning eighteen.
6 The Court does not find this argument persuasive, however. As stated in
7 Flores-Chavez: "no minor alien under eighteen should be presumed responsible for
8 understanding his rights and responsibilities in preparing for and appearing at final
9 immigration proceedings." Id at 1157. The Court made no analysis of any of
10 Flores-Chavez's individual characteristics, other than that he was under eighteen.

11 The Notice describing Defendant's legal rights and the importance of the
12 removal hearing was sent while he was a minor. It should make no difference that
13 Defendant was eighteen at the actual hearing where he is presumed to be unaware of
14 the importance of that hearing. Perhaps at seventeen years, eleven months, and eleven
15 days old, Defendant was able to understand the implications of the notice of hearing.
16 Maybe it is even likely that he could. But the Court does not believe it is permitted,
17 nor is there an adequate record before it, to make case-by-case assessments of an
18 individual's capacity for understanding their legal rights. The I.N.S.'s own regulations
19 create a bright line rule that individuals older than eighteen have such an
20 understanding and those younger do not. *See id.*

21 Alternatively, the Government argues that Defendant's father was served
22 because he and Defendant resided at the same residence, that to which the notice was
23 sent. The Government tries to distinguish this situation from that in Flores-Chavez
24 where the record did not "specify precisely to whom Flores was released." Id. at 1154,
25 n.2. This argument assumes that Defendant's father would open mail addressed to his
26 teenaged son. In any event, the Government must prove "by clear, unequivocal, and
27 convincing evidence that written notice was so provided" to the alien. 8 U.S.C. §
28 1229a(b)(5)(A). After Flores-Chavez, this notice would include that to his guardian.

1 Other than the Government's assumption that Defendant's father would read his son's
2 individually-addressed mail, it offers no additional evidence that the father received
3 notice of the hearing.

4 Because no notice was sent to his father, Defendant's underlying *in absentia*
5 removal violated due process under Flores-Chavez. This is sufficient cause for the
6 Court to dismiss the Indictment.

7 **B. Erroneous Information about Available Administrative Relief**

8 In addition to attacking notice, Defendant makes a second claim for dismissal.
9 The letter scheduling Defendant's departure (sent via registered mail and received by
10 Defendant) states that Defendant is entitled to no administrative relief and must report
11 for deportation. Defendant contends this statement is erroneous because he could have
12 applied to reopen the proceedings and choose voluntary departure. He argues that this
13 amounts to a due process violation.

14 Defendant relies on United States v. Arias-Ordonez, a Ninth Circuit case with
15 remarkably similar facts. 597 F.3d 972 (9th Cir. 2010). An immigration judge ordered
16 Arias-Ordonez removed *in absentia* after he did not appear for his hearing. His initial
17 Notice of Appearance did not contain the date or time of his hearing, and he claimed
18 to never have received the complete notice sent a week later. Like Defendant,
19 Arias-Ordonez received a letter shortly before his scheduled departure with verbatim
20 language as Defendant's:

21 "A review of your file indicates that there is no administrative relief
22 which may be extended to you, and it is now incumbent on this Service
to enforce your departure from the United States."

23 He was deported, but returned to the United States and charged with illegal reentry.

24 The Arias-Ordonez Court found the letter to be an affirmative misstatement of
25 the law and a due process violation. 597 F.3d at 978. "The statement that there were
26 no administrative remedies available was not a true statement, because an alien
27 ordered removed *in absentia* has a statutory right to seek to reopen his case and
28 petition for relief." Id. at 975 (citing to 8 U.S.C. § 1229a(b)(5)(C)(ii)). The Court

1 found that this statement affected the Arias-Ordonez's due process rights because he
2 lacked sophistication and could not know "how to pursue administrative or judicial
3 remedies." Here, it is difficult to believe that Defendant would do anything but take
4 the I.N.S. at its word when it declared no relief was possible.

5 The Government argues that Arias-Ordonez is inapplicable because both parties
6 agreed that the defendant never received notice of his hearing. While that is true, the
7 holding was not contingent thereon. Id. at 976 ("We do not need to address" whether
8 defendant received notice of the time and place of hearing.). Rather, the court relied
9 only on the erroneous statement about the availability of administrative relief to
10 conclude that the defendant launched a successful collateral attack under 8 U.S.C. §
11 1326(d). Id. at 977 (noting that the first two statutory requirements—exhaustion and
12 deprivation of judicial review—are satisfied when the government misinforms an
13 alien about the availability of relief).

14 To support dismissal of an indictment, a due process violation must prejudice
15 Defendant. Ubaldo-Figueroa, 364 F.3d at 1048. To demonstrate prejudice, Defendant
16 needs only show that he had plausible grounds for relief. United States v.
17 Lopez-Velasquez, 568 F.3d 1139, 1145 (9th Cir. 2009). Here, as in Adrias-Ordonez,
18 Defendant could have voluntarily departed in lieu of deportation under 8 U.S.C. §
19 1229c. Defendant was not an aggravated felon and had not previously availed himself
20 of voluntary departure. He declares that he would have left voluntarily if allowed.
21 This is sufficient to show prejudice. Id. at 978.

22 The Government does not contest that Defendant was eligible for voluntary
23 departure. Instead, it argues that his petition to reopen the proceedings would fail
24 because he could not demonstrate that he lacked actual notice of his hearing.
25 Regardless of whether this is true, Defendant was told authoritatively that he could not
26 even try. He is not required to show that relief would be certain to flow from his
27 efforts, United States v. Muro-Inclan, 249 F.3d 1180, 1184 (9th Cir. 2001), rather he
28 need only demonstrate that relief is plausible. The Court finds he does that here.

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. The Defendant's Motion to Dismiss (ECF No. 34) is **GRANTED**.

3 2. The above-captioned case is **DISMISSED with prejudice**.

4 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
5 order, provide copies to counsel and the U.S. Marshal, and **close the file**.

6 **DATED** this 2nd day of September, 2011.

7
8 *s/Robert H. Whaley*
9 **ROBERT H. WHALEY**
United States District Judge

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